



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Eagle Asphalt & Oil, Inc.
File: B-240340; B-240344
Date: November 14, 1990

Manuel M. Savala for the protester.
Sherry K. Kaswell, Esq., and Justin P. Patterson, Esq.,
Department of the Interior, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Protester's bids were properly rejected as nonresponsive where the bids contained commercial bid bond forms which may not hold the surety liable for the protester's failure to furnish payment bonds.
2. Since the Buy Indian Act does not require an agency to accept a nonresponsive bid on an invitation for bids (IFB) set aside under that Act, a low bidder which did not submit an acceptable bid bond by bid opening was properly rejected as nonresponsive under an IFB provision "may" be cause for rejection.

DECISION

Eagle Asphalt & Oil, Inc. protests the rejection of its low bids under invitations for bids (IFB) No. SB-90-0036, for road construction requiring emulsified asphalt crack sealer and restorative seal coat, and IFB No. SB-90-0040, for road construction requiring chip sealing, issued by the Department of the Interior, Bureau of Indian Affairs. Both IFBs were set aside for Indian owned and controlled firms pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1988). The bids were rejected as nonresponsive for failing to provide bid guarantees in accordance with the IFBs' requirements.

We deny these protests.

Each IFB required the submission of a bid guarantee, and, if a bidder received the award, a performance bond and payment bond. The solicitation package contained a Standard Form (SF) 24, to be used by bidders for the bid guarantee, and

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SFs 25 and 25-A, to be used for the performance and payment bonds. Bidders were cautioned that the failure to furnish a bid guarantee in the proper form and amount might be cause for rejection of the bid.

Eagle submitted its bid guarantee on commercial forms furnished by its surety, Amwest Surety Insurance Company. The Bureau determined that the commercial bid bond forms rendered Eagle's bids nonresponsive because these forms did not afford the government the same protection as an SF 24.

Eagle contends that it was improper for the Bureau to reject its bids as nonresponsive because the IFBs only stated that the failure to furnish the bid guarantee in the proper form "may" be cause for rejection of the bid. Eagle argues that its commercial forms afforded the government the same protection as an SF 24 and met the basic requirements of an SF 24 because they were (1) submitted in a timely manner, (2) properly executed with signatures from Eagle and Amwest, (3) documented by corporate seal with notarization, (4) in the proper amount (20 percent of bid amount), and (5) submitted by a government approved surety company.

A bid guarantee assures that the bidder will not withdraw its bid within the time specified for acceptance and, if required, will execute a written contract and furnish performance and payment bonds. When the guarantee is in the form of a bid bond, it secures the liability of a surety to the government if the holder of the bond fails to fulfill these obligations. Allgood Elec. Co., B-235171, July 18, 1989, 89-2 CPD ¶ 58. Its purpose is to secure the surety's liability to the government for excess procurement costs in the event the bidder fails to honor its bid by not executing the further necessary contractual documents and giving the required bonds. See G&G Steel, Inc., B-225750, Apr. 1, 1987, 88-2 CPD ¶ 54. A bidder's use of a commercial bid bond form, rather than an SF 24, is not per se objectionable, since the sufficiency of the bond does not depend on its form, but on whether it represents a significant departure from the rights and obligations of the parties as set forth in the SF 24. Allgood Elec. Co., B-235171, supra.

We find that Eagle's commercial forms significantly departed from the rights and obligations of the parties as set forth in the SF 24. The commercial bond forms provided, in relevant part:

"NOW, THEREFORE, if said contract be awarded to the Principal and the Principal shall, within such time as may be specified, enter into the contract in writing, and give bond, with surety acceptable to the Obligee [the agency] for the faithful

performance of the said contract; or if the Principal shall fail to do so, pay to the Obligee the damages which the Obligee may suffer by reason of such failure not exceeding the penalty of this bond, then this obligation shall be void; otherwise to remain in full force and effect."

Thus, the commercial forms only hold the surety liable for the protester's failure to enter into the contract and give bonds for the performance of the contract. In contrast, an SF 24 obligates the surety to pay damages to the government if the bidder should fail to execute further contractual documents and give "the bonds required by the terms of the bid." As noted previously, the IFBs here required bidders to furnish payment bonds, as well as performance bonds.^{1/} Under the terms of the commercial bond forms submitted here, it is not clear that the Bureau has the right to obtain procurement costs from Eagle's surety if Eagle were terminated for default because Eagle failed to provide the payment bonds in accordance with the terms of these IFBs. See G & G Steel, Inc., B-225750, supra. Therefore, we find that the Bureau properly rejected Eagle's bids as nonresponsive for failing to furnish bid guarantees in the proper form.

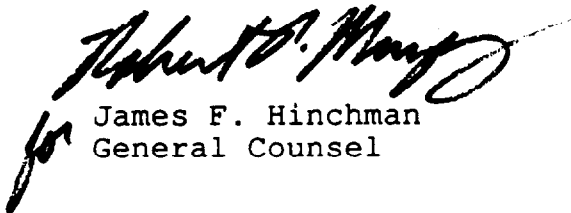
Eagle contends that the Bureau is authorized to waive the nonresponsiveness of its bids under the Buy Indian Act, since the IFBs only stated that failure to provide an acceptable bid guarantee "may" be cause for rejection and the acceptance of Eagle's bids would represent significant cost savings. It is true that the Buy Indian Act gives the Secretary of the Interior broad discretion to contract exclusively with Indian-owned firms to the extent practicable, without regard to the requirements of the Competition in Contracting Act (CICA). See Department of Health and Human Services--Request for Advance Decision, B-232364, Oct. 5, 1988, 88-2 CPD ¶ 325; Vallie Enters., B-200339, May 29, 1981, 81-1 CPD ¶ 423. However, nothing in the Buy Indian Act requires an agency to accept a nonresponsive bid in a sealed bid procurement set aside under the Buy Indian Act, nor does that Act provide for any exemptions from the Miller Act bond requirements. Since the Bureau issued a competitive sealed bid procurement to fulfill its requirements, it should reject any nonresponsive

^{1/} A payment bond is required by the Miller Act, 40 U.S.C. § 270a-270f (1988), for all construction contracts in excess of \$25,000. The payment bond is for the protection of laborers and material men on construction contracts and obligates the surety to make payment to all such persons if the contractor does not promptly do so. Failure of a contractor to provide the government with a payment bond would put the contractor in default.

bid, regardless of the pecuniary advantage of accepting such a bid in a particular case, to maintain the integrity of the competitive bid system. See generally A.D. Roe Co., 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194; HoseCo, Inc., B-226420, Mar. 12, 1987, 87-1 CPD ¶ 282.

Thus, although the IFBs indicated that the failure to furnish the bid guarantee in the proper form "may" be cause for rejection of a bid, we have held that this language is just as compelling and material as if more positive language were employed. See A.D. Roe, Co., Inc., 54 Comp. Gen. supra at 275; G&G Steel, Inc., B-225750, supra. Moreover, a bond deficiency may not be corrected after bid opening, as the surety here attempted to do. Drill Constr. Co., Inc., B-239783, June 7, 1990, 90-1 CPD ¶ 538. Otherwise, a bidder would have the option of accepting or rejecting the award by either correcting or not correcting the bond deficiency, which is inconsistent with the sealed bidding system. Id.

These protests are denied.


for James F. Hinchman
General Counsel